IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
TYSON FOODS, INC., *et al.*, Defendants.	)	

STATE OF OKLAHOMA'S SUPPLEMENTAL BRIEF IN OPPOSITION TO "TYSON POULTRY, INC.'S MOTION TO DISMISS COUNT 3 OF PLAINTIFFS' FIRST AMENDED COMPLAINT"

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits the following supplemental brief in further opposition to Defendant Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint (DKT # 64).[1]

I. The State's March 9, 2005 Notice of Intent to File Suit under RCRA complied with all of the applicable notice requirements

Nothing in Tyson Poultry, Inc.'s ("Tyson") Reply (DKT # 145) changes the fact that Tyson's contention that the State's Resource Conservation and Recovery Act ("RCRA") claim should be dismissed on the ground that the State allegedly failed to give adequate notice is without merit. First and foremost, *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), pertained solely to the issue of compliance with the statutory notice requirements under RCRA;

[1] This Memorandum in Opposition is intended to respond not only to the Tyson Motion / Reply, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Tyson Motion / Reply.

it did not address at all the issue of compliance with any regulatory notice requirements under RCRA. Tyson's effort to bootstrap *Hallstrom* onto the RCRA regulatory notice requirements -- to the extent they might even be applicable -- must be rejected.

Second, Tyson continues to try to improperly analogize notice provisions in the Clean Water Act ("CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to the notice provisions in RCRA despite the fact that, unlike RCRA, the CWA and CERCLA contain explicit statutory mandates requiring compliance with regulatory notice provisions. *See* 33 U.S.C. § 1365(b) ("Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation") (emphasis added); 42 U.S.C. § 9659(d) ("Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation") (emphasis added). RCRA contains no such explicit statutory mandate -- a fact Tyson simply ignores in its Reply. Thus, the new cases relied upon by Tyson in footnote 1 of its Reply and Tyson's subsequent discussion of the *Fried* case -- all of which involve the CWA or CERCLA -- are simply not on point.

Third, Tyson's new reliance upon *Darbouze v. Chevron Corp.*, 1998 WL 42278 (Jan. 8, 1998 E.D. Pa.), is unavailing. *Darbouze*, an unreported decision, held that a section 7002(a)(1)(B) -- *i.e.*, 42 U.S.C. § 6972(a)(1)(B) -- "substantial endangerment" citizen suit must comply with the regulatory notice requirement set forth in 40 C.F.R. § 254.2. The basis for this holding was the following reasoning: "[t]he regulation specifies that it applies to actions brought under section 7002(a)(1), which includes both sections (A) and (B)." *See Darbouze,* 1998 WL 42278, *2. This reasoning, and hence the holding, is erroneous. Specifically *Darbouze* fails to appreciate that RCRA was amended in 1984 to add 42 U.S.C. § 6972(a)(1)(B) "substantial endangerment" actions. *See* Pub. Law 98-616. Prior to the 1984 amendment there only existed

one type of citizen suit -- a "violation" citizen suit, and because there was only one type it was denominated a section 6972(a)(1) action. Because with the 1984 amendment there were now two types of citizen suits, Congress amended the numbering system of the statute. A section 6972(a)(1) "violation" citizen suit became a section 6972(a)(1)(A) action, and the newly added "substantial endangerment" citizen suit became a section 6972(a)(1)(B) action. *See* Pub. Law 98-616, Sec. 401 ("Section 7002(a)(1) of the Solid Waste Disposal Act '42 U.S.C. 6972' is amended by -- . . . (2) inserting '(A)' immediately after '(1)'") (emphasis added). In other words, prior to 1984, section 6972(a)(1) pertained only to what are now known as section 6972(a)(1)(A) "violation" actions. This fact is important in that 40 C.F.R. § 254.2, which states in pertinent part that "[n]otice of intent to file suit under subsection 7002(a)(1) of the Act . . . ," was promulgated on October 7, 1977, seven years prior to the amendment of RCRA. 42 Fed. 56114. Moreover, 40 C.F.R. § 254.2 was not amended following the 1984 RCRA amendment. Thus the reference to 7002(a)(1) in 40 C.F.R. § 254.2 refers to what are now known as § 6972(a)(1)(A) "violation" actions, not § 6972(a)(1)(B) "substantial endangerment" actions. Accordingly, the reasoning in *Darbouze* -- namely, that "[t]he regulation specifies that it applies to actions brought under section 7002(a)(1), which includes both sections (A) and (B)" -- is erroneous. *See* 1998 WL 42278, *2. Underscoring the inapplicability of 40 C.F.R. § 254.2 is that this section speaks in terms of "violators" and "violations." *See* 40 C.F.R. § 254.2(a)(1). The terms "violators" and "violations" are obviously the language of 42 U.S.C. § 6972(a)(1)(A) "violation" actions, not 42 U.S.C. § 6972(a)(1)(B) "substantial endangerment" actions such as the one being brought here. Finally, it should not be forgotten that the State has cited in its responsive papers two reported and better reasoned decisions decided subsequent to *Darbouze* that hold that claims brought

pursuant to 42 U.S.C. § 6972(a)(1) do not have to comply with regulatory notice provisions found in 40 C.F.R. § 254.2(a)(1).

Fourth, Tyson's argument that the content of the State's notice is somehow defective is merely a generic and conclusory rehash of its original argument and fails to acknowledge that the State's notice letter did in fact inform Tyson what it is doing wrong, *see* FAC, Exhibit 5, pp. 2-3 ("[I]t has been the practice of the Poultry Integrators to dispose of this waste on lands within the IRW, resulting in the release of this waste and associated pollutants, into the soils, ground water and surface waters of the IRW -- a practice which may and does present an imminent and substantial endangerment . . .") and what corrective actions will avert a lawsuit. *See* FAC, Exhibit 5, p. 4 ("immediately cease all disposal and releases of poultry waste to the environment"). Tyson thus has sufficient "notice of the endangerment." *See* 42 U.S.C. § 6972(b)[2 & 3]

Simply put, nothing in Tyson's reply changes the fact that the State's March 9, 2005 Notice of Intent to File Suit under RCRA complied with all of the applicable notice requirements and, thus, there is no basis for dismissal.

II. The State may bring a RCRA citizen suit claim

Despite a contrary, unequivocal and binding statement by the Supreme Court on the matter -- *see United States Department of Energy v. Ohio*, 112 S.Ct. 1627, 1634 (1992) ("A State is a 'citizen' under the CWA and a 'person' under RCRA, and is thus entitled to sue under these

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[2] There are no regulations mandating the content of the pre-filing notice for a 42 U.S.C. § 6972(a)(1)(B) suit. *See Blumenthal Power Company, Inc. v. Browning-Ferris, Inc.*, 1995 WL 1902124, *3 (Apr. 19, 1995 D. Md.).

[3] Tyson's contentions that their conduct is "lawful" and "specifically authorized by statute" should not be credited. The State obviously disagrees, and in any event, the lawfulness of Tyson's conduct is an issue for trial.

provisions") -- Tyson continues to press its contention that the State cannot bring a RCRA citizen suit claim. The State having fully undercut the initial case relied upon by Tyson in its responsive papers, *California v. Department of the Navy*, 631 F.Supp. 584 (N.D. Cal. 1986), Tyson now emphasizes another case, *United States v. City of Hopewell*, 508 F.Supp. 526 (E.D. Va. 1980), in its Reply. *Hopewell*, however, suffers precisely the same legal flaws as *California* and therefore is no more persuasive.[4]

In sum, 42 U.S.C. § 6972(a) provides that "[e]xcept as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf . . . ." A "state" is a "person" under RCRA. Neither subsection (b) or (c) of 42 U.S.C. § 6972(a) except a state from commencing an action. In fact, 42 U.S.C. § 6972(b)(2)(C)(i) expressly contemplates a state bringing a 42 U.S.C. § 6972(a)(1)(B) action. *See* 42 U.S.C. § 6972(b)(2)(C) ("No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment -- (i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section"). Therefore, the State may bring a RCRA citizen suit action.

III. Conclusion

WHEREFORE, premises considered, Defendant Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint should be denied.

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[4] *Hopewell*, like *California*, is a CWA case, not a RCRA case. In any event, a far more recent case, *United States v. City of Toledo*, 867 F.Supp. 595 (N.D. Ohio 1994), flatly rejected contentions that a state could not bring a citizen suit under the CWA.

Respectfully Submitted,

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